No. 95-853

IN THE
Supreme Court of the United States
October Term, 1995

M.L.B.,

Petitioner,

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Writ of Certiorari To The Supreme Court of Mississippi

REPLY BRIEF FOR PETITIONER

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25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Publications and Reports

REPLY BRIEF FOR PETITIONER

We noted in our opening brief that this Court's decisions in the access to justice cases have been grounded in both the Due Process and the Equal Protection clauses, with some decisions relying upon one rather than the other. Our contention is that the Mississippi Supreme Court's judgment in this case violates both clauses. Brief for Petitioner 30-31. The respondent's brief, prepared by the Mississippi Attorney General's office in defense of the judgment of the Mississippi Supreme Court, is essentially organized into four substantive areas of argument, the first three dealing with the Due Process Clause and the last with the Equal Protection Clause. But many of the points we make in this reply brief regarding the first three arguments are pertinent not only to the due process issue, but to the equal protection question as well.

The four areas of argument in the State's brief are the following: (1) The trial in this case was "fundamentally fair" with a low risk of error; appeals in these sorts of cases are "rarely successful"; and because there is no federal constitutional right to an appeal, there is no constitutional infirmity in excluding those who cannot afford the price the State is charging. Brief for Respondents 5, 10-12, 25-26. (2) A ruling in the petitioner's favor would require the State to "subsidize" the "actual costs" it must pay for transcripts; these costs would be "potentially huge"; and a "Pandora's box" would be opened in which civil litigants in all types of cases would be able to claim free transcripts. *Id.* 4, 12-14, 27-30. (3) Although indigent defendants in felony and misdemeanor criminal cases are entitled under the Fourteenth Amendment to pursue existing appellate avenues even if they cannot afford the fees and costs charged by the state, the underlying Fourteenth Amendment principles do not apply to any civil cases. *Id.* 4, 14-22, 24-25. (4) Because Mississippi requires all civil appellants to pay the fees and costs involved in an appeal, and has not singled out any particular group of

appellants, there is no violation of the Equal Protection Clause. *Id.* 30-34.

In this reply, we address the first three in turn, discussing concepts related both to the due process and equal protection points. We then address the fourth, which is focused purely on the equal protection issue.

Before that, however, we reply to the effort of the Attorney General's office in its brief to embroil itself in the underlying merits of this case by choosing up sides on matters that are not before this Court. Rather than simply defend the judgment of the Mississippi Supreme Court, which was unrelated to the merits but was premised solely upon the petitioner's inability to pay some $2300, the Attorney General's office goes outside of the existing record, taking the side of the father and his new wife to suggest that the Chancellor was correct in terminating the petitioner's parental rights. In doing so, the brief claims "[a]t the time of the divorce, petitioner was living with a convicted felon who drank heavily and could be violent," *id.* 1, the petitioner lost custody of her children in the original divorce proceeding "as a result of her [own] actions," she subsequently failed to show "any meaningful concern for [her children's] welfare," her relationship with them was "a purely biological relationship devoid of any meaningful association," and her interests are counter to "the interests of the children." *Id.* 24.

Of course, the Attorney General's office was not involved in the trial of this case, so it has no knowledge of the evidence presented. It is not relying upon a transcript of the trial, since there is none. None of the pleadings in the record support the allegations it is making in this Court. The complaint itself did not allege any sort of abuse or dangerous conduct by the petitioner, but contended only that she had not kept up visitation and child support payments, and even to

that extent, the complaint was disputed by the petitioner. The prior divorce decree reflects only that the petitioner agreed to the custody arrangement and in no way suggests that she lost custody "as a result of her [own] actions."

Even if Rule 10(b) of the Mississippi Rules of Appellate Procedure did not specifically require a transcript for a merits appeal in a case like this, these uncited and unsupported allegations illustrate the need for a transcript in the Mississippi Supreme Court so the petitioner can respond to such claims. In light of the absence of a transcript, and because this is neither the time nor the place to argue the merits of the underlying appeal -- except to point out that Mississippi law provides a meaningful appeal for those who can afford it and that the petitioner could take advantage of that appeal if she had the money, *see*, Pet. Br. 18-21 -- we respond no further to these assertions. Suffice it to say that the petitioner cares deeply about her children and properly believes she has a strong case on the merits.

I. WHETHER OR NOT THE TRIAL WAS "FUNDAMENTALLY FAIR," AS THE RESPONDENT CONTENDS, THE FOURTEENTH AMENDMENT IS VIOLATED BY THE PRECLUSION OF THE PETITIONER FROM A MEANINGFUL APPEAL AVAILABLE TO OTHERS, DUE ONLY TO HER INABILITY TO PAY THE STATE OVER $2,000 IN ADVANCE.

Repeatedly, the brief submitted on behalf of the State of Mississippi contends that the trial here was "fundamentally fair," Resp. Br. 5, 9-11, 14-15, 23-24, 29, and that because this Court has never recognized a constitutional right to an appeal *per se*, there can be no constitutional violation in denying to the petitioner the appeal available under Mississippi law to others with more money. *Id.* 9, 11, 16-17.

The brief also claims that there is "a negligible risk of error in this case" and that appeals in a case like this one are "rarely successful." *Id.* 26.

In terms of "fairness," the respondent asserts in one of the subheadings of its brief that "[t]here is no dispute that the trial below was fair." *Id.* 10. In fact, there is a dispute. Although it perhaps reflects a difference in semantics, the petitioner contends that the trial was unfair, and that she was deprived of her relationship with her children on evidence that is irrelevant and does not meet the requirements of Mississippi law and the Fourteenth Amendment. *See,* Miss. Code § 93-15-109; *Santosky v. Kramer*, 455 U.S. 745 (1982). Of course, this contention is properly presented to the Mississippi appellate courts in an appeal on the merits, as is the respondent's claim that she received a fair trial.

What is germane in this Court is the fact that the State of Mississippi has created a right of appeal in recognition of the fact that trial proceedings are not infallible and are not free of error. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 28-29 (1981) (appellate review is a means of reducing the risk of error in parental termination cases). Whether a litigant was denied certain procedural protections, and whether his or her parental rights were terminated improperly in light of the evidence, are matters the State allows to be raised in such appeals. Mississippi law does not limit those appeals to the sort of structural process issues upon which the respondent's brief relies in this Court. Resp. Br. 5, 10. Thus, the respondent's repeated claims of "fairness" at the trial level are beside the point at this stage of this case.

Although this Court has never interpreted the Constitution to require states to establish appellate review in the first place, the Court has held many times -- both in civil

and criminal cases -- that once a state establishes a right of appeal, the right may not be granted to some and arbitrarily denied to others. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). This is independent of whether any due process violations occur in the trial court. As this Court said in *Ross*, the Fourteenth Amendment requires "that the state appellate systems be 'free of unreasoned distinctions,' . . . and that indigents have an adequate opportunity to present their claims fairly within the adversary system." 417 U.S. at 612 (citation omitted). "Unfairness results," according to the opinion in *Ross*, "if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." *Id.* at 611. While *Ross* involved a criminal defendant, this Court did not limit itself in the language just quoted to criminal cases. Moreover, this Court in *Lindsey* expressed the same sort of sentiment against the arbitrary denial of a state-created right of appeal in the context of a civil case. 405 U.S. at 77, 79.

Indeed, these and related cases, including *Boddie v. Connecticut*, 401 U.S. 371 (1971), are manifestations of the constitutional principle that citizens have a right of access to their courts, just as they have a right to petition other branches of government, and the right of access cannot be arbitrarily denied in cases involving important and fundamental rights.

Returning to the claim of "fundamental fairness," the respondent's brief contends that, because of certain procedures in the trial court, there is only "a negligible risk of error in this case" and that appeals in cases like this are "rarely successful." Resp. Br. 26. The respondent's point is refuted by the cases we cited at pp. 20-21 of our opening brief demonstrating the careful appellate review and the high rate

of reversal in termination cases. Beyond that, in civil cases generally, the Mississippi Court of Appeals reversed or vacated nearly 39% of the trial court decisions it reviewed in 1995 and the Mississippi Supreme Court reversed or vacated nearly 37%. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 22, 41. Particularly in the present case, where the trial judge cited no specific evidence and merely recited the statutory language in his termination order,[1] it is wrong to contend that the risk of error is "negligible." *See, Tricon Metals & Services, Inc. v. Topp*, 516 So.2d 236, 239 (Miss. 1987) (where a case is of any complexity and is hotly contested, the failure of the trial court to make findings of fact will generally be regarded as an abuse of discretion).

Of course, the constitutional issue here turns not on the strength of this particular appeal or the likelihood of reversal, but on whether the petitioner can be denied access to an appellate courthouse open to others, in a case of this importance, simply because she does not have some $2300 to pay in advance. The risk of error in the present case, and the strong possibility of prevailing on appeal if the petitioner were not barred, serve only to illustrate the unfairness of allowing some to appeal the termination of their status as a parent, while closing the courthouse door to those who are unable to come up with the money.

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[1] For example, in repeating the catch-all language of Miss. Code § 93-15-103(3)(e), the Chancellor said that the petitioner was guilty of "serious . . . abuse," Resp. Br. 10-11, *quoting*, Pet. App. 8, 10. However, there was no allegation of abuse in the complaint in this case or at any other stage of the proceedings.

II. A RULING IN THE PETITIONER'S FAVOR WILL NOT OPEN WHAT THE RESPONDENT CALLS A "PANDORA'S BOX" AND WILL NOT REQUIRE STATES TO EXPEND LARGE SUMS OF MONEY SUBSIDIZING "ACTUAL COSTS" OF COURT REPORTERS.

According to the respondent's brief, the State of Mississippi is being asked to "subsidize" the "actual costs" of the appeal in this case. Resp. br. 4, 12. The brief claims: "The petitioner in this case does not seek simply to get a waiver of a filing fee . . . but instead seeks to have the State pay the costs of having the record prepared, including preparation of the transcript by the court reporter." *Id.* 12. A ruling by this Court for the petitioner "would result in potentially huge additional expenses being heaped upon the states," contends the respondent, and a "Pandora's box" would be opened so that states "will be forced to bear the costs of all appeals of indigents in a wide variety of cases." *Id.* 27-28.

The short answer to the State's claim of fiscal undoing is that cost is not a sufficient justification for erecting a dual system of justice in cases involving fundamental rights, with the wealthier able to defend their rights as parents both at the trial court and on appeal if necessary, while the poor are allowed access only to a single proceeding before a single trial judge. But even if cost were an issue, the State of Mississippi vastly overstates the financial impact of a ruling by this Court in the petitioner's favor.

Indeed, the issue in this case does not encompass a filing fee – since it was paid by the petitioner – but instead involves a $2300 plus charge for assembling the trial court record at $2.00 per page both for the non-testimonial pleadings and for the testimonial transcript. Pet. App. 15.

While the State contends that filing fees offset the cost of operating the court system, it does not make the same contention for the $2.00 per page charges. Instead, it merely asserts that these are actual costs that the State would have to pay out of its treasury if impoverished appellants were allowed to appeal terminations of parental rights. Resp. Br. 27.

However, the costs at issue are *not* actual, out-of-pocket expenses the State is required to pay, but instead are expenditures within the State's own control. In terms of the *non-testimonial record*, Mississippi charges $2.00 for each page of the existing pleadings and papers, which are assembled by full-time employees in the Chancery and Circuit Clerk's offices. Miss. Code § 25-7-13(6).[2] However, $2.00 per page is not the actual cost the State incurs. This is clear from contrasting the Mississippi practice with that in the federal courts. While the federal courts require non-indigent appellants to pay for transcripts, Rule 10(b)(4), Federal Rules of Appellate Procedure, they do not require appellants to pay any per page charges for assembling and shipping the existing non-testimonial record from the trial court to the court of appeals. It is simply irrational for the State of Mississippi to preclude indigent parents from appealing a case terminating the fundamental right of parenthood because they cannot pay $2.00 per page to assemble, box, and ship the non-testimonial record.

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[2] The text of § 25-7-13(6) actually deals with record preparation fees charged by clerks in the Circuit Courts. No particular figure for such fees is included in the statute covering Chancery Court Clerks. Miss. Code § 25-7-9. In practice, Chancery Clerks in Mississippi charge the $2.00 per page fees that are statutorily prescribed for Circuit Clerks in § 25-7-13(6). Luther T. Munford, *Mississippi Appellate Practice*, § 7.2 n.10. That is the fee that was charged in this case, which was an appeal from a Chancery Court decision. Pet. App. 15.

As for the *testimonial record*, it also is irrational to preclude indigents in such cases from appealing because of a $2.00 per page fee to print a transcript. This is not a cost that exists through the operation of a free market, but instead arises because Mississippi law requires that court reporters be paid $2.00 per page. Miss. Code §§ 25-7-13(6) 25-7-89. Mississippi law also requires that court reporters be paid $2.00 per page for a transcript in an indigent appeal in a criminal case. Miss. Code § 25-7-13(4). But some states do not charge that much. *See, e.g.*, R.I. Superior Ct. R. Civ. Pro. 78 ($1.00 per page). Certainly, if it chose to save the money, Mississippi could charge less and pay court reporters less for transcripts generally, or specifically for pauper transcripts.

In Mississippi, each trial judge has an official court reporter, and under Mississippi law, that reporter is an officer of the court and an employee of the State. Miss. Code §§ 9-13-1, 9-13-5. The reporter is paid an annual salary of $33,000. Miss. Code § 9-13-19. Under current practice, that court reporter also has a monopoly on all trial transcripts that are ordered from cases in that court, for which the reporter is paid $2.00 per page over and above the $33,000 annual salary. Miss. Code § 25-7-89. But if it chooses to save money, the State can alter that practice, even slightly. Just as attorneys are officers of the court and are sometimes required to render services for no compensation or for a reduced fee, *see, e.g.*, Rules 39.6-39.7 of the Rules of this Court (attorneys appointed in civil cases are reimbursed for travel expenses, but no provision exists for payment of fees), Miss. Code § 99-15-17 (appointed attorneys in felony cases receive a maximum fee of $1,000), so court reporters in Mississippi are officers of the court, and the State can require that they provide certain services to indigents without charge or at reduced rates. *See, e.g.*, Tex. R. App. Proc. 53(j) (court reporters are paid for transcripts for indigents in criminal cases, but must provide them without pay for indigents in

civil cases); W.Va. Code §§ 51-7-7, 59-2-1(a)(3) (same).

In addition, the economics of modern-day court reporting suggest that $2.00 per page is not a realistic cost of the service performed. With computer-aided transcription, sometimes called realtime technology, the court-reporter's stenographic notes are captured on a computer disk which converts the notes into an instant text and transcript. *See,* Hewitt and Levy, *Computer-Aided Transcription: Current Technology and Court Applications*, National Center for State Courts (1994). Over 90% of the court reporters in the United States now use computer-aided transcription. *Realtime Facts*, National Court Reporters Association brochure (1996). Thus, the labor involved in producing a transcript includes being present and taking the stenographic notes during the trial, for which the court reporter is paid a salary, and then, once a transcript is ordered for appeal, reviewing and correcting the text that has been automatically produced. This additional reviewing and correcting is not an expensive proposition, and $2.00 per page is a rather high amount to charge for it. While the State of Mississippi is certainly free to charge $2.00 per page to those who can afford the price, it is not proper for the State to shut the appellate courthouse door to indigent litigants in parental termination cases on the pretense that $2.00 per page is the "actual cost" of the services involved.

Whatever the State chooses to pay per page for an indigent transcript, the money often can be recouped. In Mississippi, if an appellant prevails on appeal, the costs of the transcript are generally taxed against the opposing party, who can then reimburse the State in cases involving indigent appellants. Rule 36, M.R.A.P.

In sum, the sole interest proffered by the State in support of excluding poor people from in forma pauperis appeals in

parental termination cases -- the "actual costs" it will have to pay from the treasury, Resp. Br. 27 -- is simply not a real interest and is not something beyond the State's control. It does not justify a wholesale refusal of the appeals of poor people in parental termination cases.

Apart from its "actual costs" contention, the State of Mississippi argues in this Court that a ruling for the petitioner in the present case will open a "Pandora's box" that "would arguably include all domestic relations matters such as divorce, paternity, and child custody, as well as other cases where 'important' interests are being litigated." Resp. br. 28. However, this Court's prior Fourteenth Amendment precedents do not justify this concern. The Court has held that appointment of counsel will sometimes be required in parental termination cases, *Lassiter*, 452 U.S. at 31-32, but has never come close to holding that counsel is required in paternity or other domestic relations cases. The Court has held that a clear and convincing standard of proof is required in parental termination cases, *Santosky v. Kramer*, 455 U.S. 745 (1982), and civil commitment cases, *Addington v. Texas*, 441 U.S. 418 (1979), but has not extended that standard to a wide panoply of other civil actions. This Court can resolve the issue in the present case based upon the interest here -- that of a parent whose relationship with her child is being terminated by a Chancery Judge in Mississippi -- without necessarily holding that indigents have a right to in forma pauperis appeals in other civil actions of a lesser magnitude.

It is not clear if the State is attempting to suggest that the interests in "all domestic relations matters," resp. br. 28, are as important as those in parental termination cases, but surely that is not the case. A termination of parental rights takes on a permanence and exclusion that is not present in other domestic relations matters. People who are divorced can still see each other and can even marry each other again

if they choose. A parent who loses custody of a child generally can visit the child, can remain a parent to the child, can be a part of the child's life, and can even petition to regain custody if circumstances change. But a termination of parental rights means the parent is no longer a parent, and no longer has a right even to see and visit with the child. In *Santosky*, the Court recognized that people have a more compelling interest in preventing the finality of a "forced dissolution of . . . parental rights" than they do in preventing adverse consequences stemming from domestic relations litigation that affects "ongoing family affairs" but falls short of parental termination. 455 U.S. at 753. Termination cases are unlike other civil actions in the sense that "[o]nce affirmed on appeal, a . . . decision terminating parental rights is *final* and irrevocable." *Id.* at 759 (emphasis in original).

Thus, it is simply wrong to suggest, as does the State's brief, that a reversal of the Mississippi Supreme Court by this Court will "result in potentially huge additional expenses being heaped upon the states." Resp. br. 4. Even if, for some reason, this Court held in the present case that in forma pauperis appeals were required in all domestic cases, that would not be a major burden on the states. As we noted in our opening brief, many states presently provide for in forma pauperis appeals, including transcripts, in all types of civil cases without suffering financial chaos. Pet. Br. 26.

At any rate, in terms of parental termination cases, it is clear the financial burden on states like Mississippi is minimal when compared to the importance of access to the courts in a case of this magnitude.

III. THE STATE OF MISSISSIPPI IS WRONG TO SUGGEST THAT THE RELEVANT FOURTEENTH AMENDMENT PRINCIPLES HAVE NO BEARING BECAUSE THIS IS A CIVIL CASE.

Even though the Fourteenth Amendment prohibits the states from limiting appeals in criminal felony and misdemeanor cases to those who can afford transcripts, the State of Mississippi strenuously urges that this principle should never be extended beyond the realm of criminal litigation. Resp. br. 4, 14-22, 24-25. In so doing, the State suggests an unbreachable wall between criminal and civil cases in terms of the Fourteenth Amendment's coverage of access for poor people to the courts of this land. Of course, no such wall exists, and if any ever did, it was traversed as long ago as *Boddie v. Connecticut*, 401 U.S. 371 (1971). There, Justice Harlan's opinion for the Court, coming in a civil case, relied upon the principles expressed in the criminal case of *Griffin v. Illinois*, noting that "[i]n *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process" and adding that "the rationale of *Griffin* covers this case." 401 U.S. at 382. *Lindsey v. Normet* also cited *Griffin* in the application of the Fourteenth Amendment to a civil appeal and, in striking down the Oregon statute at issue, specifically relied upon the fact that the statute had the effect of precluding poor people from access to appellate courts. 405 U.S. at 77, 79.

What is important in Fourteenth Amendment analysis is the gravity of the interest involved, and while compelling interests are often implicated in criminal cases, the fact that a case is labeled "criminal" or "civil" does not end the inquiry. *Compare, Lassiter v. Department of Social Services*, 452 U.S. at 31-32 (counsel will sometimes be constitutionally required in parental termination cases, which are civil) with *Scott v. Illinois*, 440 U.S. 367 (1979) (counsel is never

constitutionally required in a criminal case for a misdemeanor offense that will not lead to imprisonment). Indeed, if this Court had drawn the unbreachable line between civil and criminal cases that the State now urges, *Lassiter* would never have been resolved as it was, but instead this Court would have held that no indigent litigant in a termination case ever has a right to counsel because termination cases are civil and not criminal. In fact, none of the Justices in *Lassiter* adopted the position now urged by the State of Mississippi. Instead, the five-member majority held that the Fourteenth Amendment will require counsel in some parental termination cases and not others, while the four dissenters contended that counsel should be provided in all cases.

The State acknowledges the precedent set by *Boddie*, but contends that "[t]he decision in *Boddie* represents the outer limits of indigent court access in civil law." Resp. Br. 16. It is not clear what is meant by this phrase, but the State bases its contention to this effect in part on its view that *Lassiter* held that a refusal to appoint counsel in a termination case would not violate the Due Process Clause. Resp. Br. 16. Actually though, as just mentioned, *Lassiter* held that due process sometimes will and sometimes will not require appointment of counsel in termination cases. As for *Lindsey v. Normet*, the State argues that if *Lindsey* had indicated the applicability of *Griffin's* principles to civil appeals, *Lassiter* would have been decided differently and appointment of counsel would always be required in termination cases. Resp. Br. 17. In this sense, the State simply misunderstands the difference between the right to counsel and the far broader right of access to courts without arbitrary preclusion. *See*, Pet. Br. 29-30. Indeed, at one point in its brief, the State cites as support for its position the statement in *Lassiter* that no attorney was required in that case because there were no troublesome points of law. Resp. Br. 26, *citing, Lassiter*, 452 U.S. at 32. This misses the fact that in the present case, the

petitioner is not asking for appointment of counsel to navigate troublesome points of law, but instead simply seeks to enter the same appellate courthouse door that is open to others so she can present her case for the restoration of her rights as a parent.[3]

We are not arguing here that civil cases must be treated exactly like criminal cases. We need not contend, for example, that transcripts must be provided in all or nearly all civil appeals, major and minor, just as they must be provided in nearly all criminal appeals. Instead, we contend that it is necessary to look beyond the civil or criminal label and analyze the importance of the interest at issue. This Court has said that a misdemeanor defendant faced with a $500 fine and no jail time must be provided a transcript because of the importance of the interest involved. *Mayer v. City of Chicago*. Surely, the interest here is far more substantial, implicating fundamental rights stemming from the termination of a parent's relationship with her child -- one of the most important interests that can be adjudicated in a court of law, and certainly the most important in a civil court. Just as the appellant's indigency was not a sufficient reason to prohibit his appeal in *Mayer*, the financial status of the petitioner here is not a valid basis for shutting the appellate courthouse door and leaving her outside.

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[3] As we noted in our opening brief, *United States v. Kras*, 409 U.S. 434 (1973), and *Ortwein v. Schwab*, 410 U.S. 656 (1973) do not control here since the underlying disputes in those cases did not implicate fundamental rights and the amounts charged were not of the magnitude in the present case. Pet. Br. 16-17, 30. As for the Courts of Appeals cases cited by the respondent, Resp. Br. 17, all specifically relied upon the absence of a fundamental right. With respect to the respondent's frequent citation to decisions of this Court in the area of welfare and other government benefits, Resp. Br. 12-13, 29-33, those a far cry from the type of access to the courts issues that arise in the present case, where the petitioner has been deprived of her relationship with her children.

IV. EVEN THOUGH MISSISSIPPI CHARGES THESE SAME TYPES OF FEES AND COSTS TO ALL CIVIL APPELLANTS, THEIR IMPOSITION IN THIS CASE, PRECLUDING AN INDIGENT PARENT FROM PURSUING AN APPEAL OF A TERMINATION OF PARENTAL RIGHTS THAT IS AVAILABLE TO THOSE WITH MORE MONEY, VIOLATES THE EQUAL PROTECTION CLAUSE.

Because the Mississippi Supreme Court requires all civil appellants to pay these fees and costs, the State contends that Mississippi does not bear any animus toward indigents or intend to single them out. Resp. br. 31. "This alone resolves the equal protection issue," according to the State. *Id.* As Anatole France wrote in *Crainquebille:* "The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, or to steal bread -- the rich as well as the poor."

This Court's equal protection cases involving access to justice have suggested that indigents are, in fact, "singled out" when they are "denied meaningful access to the appellate system because of their poverty." *Ross v. Moffitt*, 417 U.S. at 611. As noted in *Griffin v. Illinois*, the preclusion of an appeal in that case through denial of a transcript was discrimination "on account of poverty." 351 U.S. at 17. In the *Griffin* line of cases, there was no need to show any further animus toward the poor. Similarly, in *Lindsey v. Normet*, this Court struck down the Oregon double-bond eviction appeal requirement in part because "[t]he discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious." 405 U.S. at 79.

Indeed, when state officials impose a fee as a condition for access to a branch of government, such as a court, they do

it with the design of precluding those who are either unwilling or unable to pay the fee. Through in forma pauperis procedures, such as affidavits, courts can distinguish those who are simply unwilling from those who are unable. When a state refuses to permit an in forma pauperis exception to a fee requirement, it clearly intends to keep out those who are unable to pay.

In determining the level of scrutiny in equal protection analysis, this Court has looked to the importance of the interest involved and the nature of the class that is targeted. *See, Romer v. Evans*, 134 L.Ed.2d 855, 865 (1996). Although the analytical scheme is anchored by the opposing poles of strict scrutiny and rational basis review, the Court's decisions do allow for some intermediate flexibility when interests and classes do not neatly fit within one extreme or the other. *See, e.g., United States v. Virginia*, 64 U.S.L.W. 4638 (1996).

One fundamental interest at issue here is the interest in equality of access to the courts, an ideal that has occupied an important role in this Court's Fourteenth Amendment analysis over the years, from *Griffin* to *Boddie* to *Lindsey v. Normet.* The underlying nature of this interest was expressed in a somewhat, but not altogether, different context in this Term's decision in *Romer v. Evans*:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring in general that it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

134 L.Ed.2d at 866-867.

In addition to that interest, the present case also includes what this Court has called the "commanding," *Lassiter*, 452 U.S. at 27, and "fundamental," *Santosky*, 455 U.S. at 753, interest that a parent has in retaining the relationship with his or her children.

In terms of the class that is affected, the State of Mississippi correctly points to this Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980) for the proposition that poor people are not *per se* a suspect class. Resp. Br. 31. *Harris* specifically stated that "poverty, *standing alone*, is not a suspect classification." 448 U.S. at 323 (emphasis added). But when the status of poverty is combined with measures that shut people off from means to affect their government in cases involving otherwise important interests, as in *Griffin* and *Boddie*, the Court has carefully scrutinized those measures and generally has struck them down.[4]

These cases are similar, in some sense, to the candidate filing fee cases. For example, in *Bullock v. Carter*, 405 U.S. 134 (1972), this Court held that it must "closely scrutinize" local election candidate filing fees that ranged into the thousands of dollars because such a fee "falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144. After closely scrutinizing that scheme, the Court struck down its application to indigents who could not afford the fee, and it did the same thing two years later with a $700 candidate filing fee in *Lubin v. Panish*, 415 U.S. 709 (1974). While those cases involved the right to vote, and were analyzed under the First Amendment as well as the Equal Protection Clause of the Fourteenth

[4] Of course, *Boddie* is a due process and not an equal protection case. It is cited here simply to illustrate the importance that this Court has attached when this combination of interests and status has come together.

Amendment, the parallels are important. Just as states are said not to be required by the federal constitution to provide appellate courts, they are also not constitutionally required to select all local governmental officials through popular elections. Yet once the states do so, and if important rights are involved, this Court has looked carefully at whether citizens are shut out from participating in their government because of their poverty.

For all of these reasons, and contrary to the respondent's contention, something more than minimal scrutiny is required here. The State's justification for denying in forma pauperis appeals in termination cases must be compelling, or at the very least substantial, before the Mississippi Supreme Court's judgment can be upheld. But as we explained in Section II of this brief, the State's interest here does not even meet the requirement of rationality, much less the requirement of a compelling or persuasive justification.

In *Romer*, this Court referred to "a denial of equal protection of the laws in the most literal sense." 134 L.Ed.2d at 867. The Equal Protection Clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The protection of the laws in Mississippi includes the right to appeal a termination of parental rights and to correct an injustice in such a case if one occurs. Given the importance of that interest, and the fact that the appeal is denied to poor people like the petitioner when a fee of this magnitude is charged as a prerequisite, the protection of the laws is not "equal." The Mississippi Supreme Court's judgment is contrary to the Fourteenth Amendment.

CONCLUSION

For these reasons, and for those stated in the opening brief, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully Submitted,

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